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SUPREME COURT, U.S.

NO. 80-5632

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

JAMES DEAN CLARK,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.(a) IS THERE A CONFLICT AMONG THE COURTS IN INTERPRETING SMITH v. ILLINOIS, 390 U.S. 129 (1968)?

I.(b) WAS PETITIONER DENIED THE RIGHT TO CROSS-EXAMINE "JOHN DOE" BECAUSE HE DID NOT GIVE HIS TRUE NAME AND ADDRESS TO THE JURY, WHEN PETITIONER KNEW HIS IDENTITY AND "JOHN DOE" WAS IMPEACHED AND PLACED IN HIS PROPER SETTING DURING HIS TESTIMONY?

II.(a) DOES MERELY QUESTIONING PROSPECTIVE JURORS ABOUT THEIR VIEWS ON CAPITAL PUNISHMENT DENY PETITIONER AN IMPARTIAL JURY?

II.(b) HAS THERE BEEN A VIOLATION OF THE STANDARDS SET OUT IN ADAMS v. TEXAS (1980) AND WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968), WHERE NO PROSPECTIVE JURORS WERE CHALLENGED FOR CAUSE BASED ON THEIR VIEWS ON THE DEATH SENTENCE?

III. PETITIONER WAS SENTENCED TO DEATH UNDER THE PROCEDURES OF ARIZ.REV.STAT.ANN. § 13-454. PRIOR TO SENTENCING, A PORTION OF THE STATUTE WAS FOUND UNCONSTITUTIONAL AND SEVERED. MAY PETITIONER BE SENTENCED UNDER THE JUDICIALLY CORRECTED STATUTE WITHOUT VIOLATION OF THE EIGHTH AMENDMENT, THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, AND THE EX POST FACTO GUARANTEES OF THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

In the early morning hours of December 4, 1977, petitioner murdered four people: his employers at a dude ranch, Mildred and Charles Thumm, and his friends and co-workers at the ranch, Gerry McFerron and George Martin. Petitioner stabbed George Martin repeatedly in the chest, damaging his heart and lungs, as Martin lay in his bed in the wrangler's quarters. (R.T. of June 14, 1978, at 1165-66.) Seventeen-year-old Gerry McFerron died of three gunshot wounds to the head. (Id. at 1163-64.) Petitioner then went up to the main house. In the hallway, he fired a shot at Charles Thumm's chest which exited his back. He fired a second shot which passed through Mr. Thumm's left

shoulder and left buttock, as he slumped forward after the first shot. Petitioner then executed Mr. Thumm, firing the third shot through the top of his head from a distance of 3 to 4 inches. (Id. at 1242-43.) Petitioner went into the bedroom where Mildred Thumm lay in bed. He fired a shot through her temple from a distance of 2 to 6 inches, took her rings, and retrieved as a souvenir the bloody bullet core, which had passed through her head. (Id. at 1244; R.T. of June 16, 1978, at 1403.)

Petitioner also took credit cards, cash, weapons, a saddle, an eight-track tape deck, and a station wagon from the ranch. He slashed tires on other vehicles before he left for El Paso, Texas. (R.T. of June 16, 1978, at 1427, 1436-37; R.T. of June 20, 1978, at 1579-80.)

In El Paso, petitioner met "John Doe," who bought heroin from him and helped him sell the guns and rings. (R.T. of June 14, 1978, at 1177, 1181-82; R.T. of June 15, 1978, at 1249.) Petitioner told John Doe he had killed three people in Arizona, and stated "You should have seen Charlie when I hit him with the Wad Cutters." (R.T. of June 14, 1978, at 1181-83.)

At petitioner's preliminary hearing, John Doe wore a ski mask and did not give his true name and address. He did remove the mask at one point and looked at petitioner, who looked back at him. (Id. at 1216-17.) At a pretrial hearing, the prosecutor furnished petitioner the true name of John Doe, his date of birth, and address. (R.T. of Apr. 7, 1978, at 2-3.) The trial court ordered that this information not be released to the public, nor revealed at trial, and ordered that the state disclose a copy of John Doe's F.B.I. rap sheet. (Id. at 3, 10.) On May 4, 1978, the trial court directed the prosecutor to have the

sheriff's office determine which offenses on John Doe's rap sheet were felonies, and stated it would permit impeachment with all offenses appearing on the list, if the felony designation was not accomplished. (R.T. of May 4, 1978, at 11.)

Prior to John Doe's testimony before the jury, John Doe stated his true name, which also appeared twice in the state's disclosure, and his location in El Paso, for which no street address exists. (Sealed Record of June 14, 1978, at 2, 6.) He testified he felt his life was in danger, and had received threats because he was a paid informant for the Drug Enforcement Administration. (Id. at 3-6.) The state provided petitioner with John Doe's felony convictions. (Id. at 11.) John Doe did not give his true name or address while testifying before the jury.

The jury found petitioner guilty of the four counts of first degree murder. Petitioner received a sentence of death, after the aggravation-mitigation hearing. The Arizona Supreme Court affirmed the judgment and sentence. State v. Clark, ___ Ariz. ___, 616 P.2d 888 (1980).

ARGUMENT

I

THERE IS NO TRUE CONFLICT AMONG COURTS IN THE INTERPRETATION OF SMITH V. ILLINOIS, 390 U.S. 129 (1968), AND PETITIONER'S CASE IS A POOR VEHICLE FOR REVIEW OF THAT DECISION BECAUSE HE CAN SHOW NO PREJUDICE RESULTING FROM "JOHN DOE'S" REFUSAL TO GIVE HIS TRUE NAME AND ADDRESS TO THE JURY.

Petitioner contends there is a conflict between the Federal Circuit Courts and state supreme courts in interpreting Smith v. Illinois, 390 U.S. 129 (1968). However, a review of the many cases cited by petitioner clearly shows there is great uniformity among the decisions

of the courts in holding that there is no per se constitutional requirement that a witness' name and address must be disclosed, and that potential danger to the witness may outweigh the defendant's need for the information to otherwise place the witness in his environment before the jury. McGrath v. Vinzant, 528 F.2d 681 (1st Cir.), cert. dismissed, 426 U.S. 902 (1976); United States v. Baker, 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970); United States v. Alston, 460 F.2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972); United States v. Conder, 423 F.2d 904 (6th Cir. 1979); United States v. Penick, 496 F.2d 1105 (7th Cir.), cert. denied, 419 U.S. 897 (1974); Caldwell v. Minnesota, 536 F.2d 272 (8th Cir. 1976); United States v. Rangel, 534 F.2d 147 (9th Cir.), cert. denied, 429 U.S. 854 (1976); United States v. Snaldone, 484 F.2d 311 (10th Cir.), cert. denied, 415 U.S. 915 (1974).

Petitioner's further contention that the Arizona Court incorrectly concluded that there must be potential danger from the defendant and no other person is also without merit. There is no logical reason to make this distinction, and the courts have not done so, contrary to petitioner's contentions. If a witness has demonstrated that danger from any person could result from public disclosure of his identity or address, and the defendant is not prejudiced if the trial court gives the witness this protection, there can be no argument that the right to cross-examine witnesses was denied. See United States v. Hansen, 569 F.2d 407 (5th Cir. 1978) (danger from other coconspirators); United States v. Baker, supra (danger from one of the codefendants); United States v. Conder, supra (fear of reprisal in general because of testimony for the government); United States v. Alston, supra (danger because

of continuing activity as an undercover agent and witness in other pending trials).

Finally, even if this Court were inclined to reconsider its holding in Smith v. Illinois, this case would be a poor vehicle for doing so because petitioner can show absolutely no prejudice from the trial court's ruling. Even though "John Doe" did not state his true name on the record of the preliminary hearing, his identity was not withheld from petitioner. John Doe removed the mask at one point and looked at petitioner. The state later disclosed John Doe's true name, location, and rap sheet. The trial court ordered the sheriff's office to determine which offenses on the rap sheet were felonies, or it would allow petitioner to impeach John Doe's credibility with all offenses appearing on the sheet. There was, therefore, no prejudice resulting from withholding John Doe's true name and address at the preliminary hearing.

The trial court held an in camera hearing to determine whether John Doe should be required to reveal his true identity to the jury. (Sealed Record on June 14, 1978.) John Doe testified he felt his life was in danger because he was a paid informant for the Drug Enforcement Administration. He also stated he had received threats to his life because of these activities. There was no address for the religious retreat he had joined.

Before the jury, he testified he was a paid informant for the Drug Enforcement Administration, and he was from El Paso, Texas. (R.T. of June 14, 1978, at 1175-76.) He also testified he was presently living in a religious retreat, and had used heroin in the past. (Id. at 1176.) John Doe revealed his felony convictions, and stated he met appellant at the Playmate Bar in El Paso, Texas, on

December 4, 1977. (Id. at 1177.) He purchased heroin, and sold some guns for appellant the next day. (Id. at 1181-82.)

Clearly, John Doe was "placed in his proper setting." The in camera hearing established that the state's representations that John Doe's identity and residence should be protected were not groundless. Petitioner was provided abundant evidence for impeachment, and his cross-examination in this area was not restricted. There was no denial of his right to confront and cross-examine witnesses.

ARGUMENT

II

PETITIONER'S ISSUE ON THE JURY VOIR DIRE WARRANTS NO REVIEW BECAUSE NO JURORS WERE CHALLENGED FOR CAUSE BASED ON THEIR OPINIONS ABOUT THE DEATH SENTENCE, AND PETITIONER DID NOT ATTEMPT TO ESTABLISH THAT A DEATH-QUALIFIED JURY IS MORE LIKELY TO FIND GUILT.

Petitioner claims it is a violation of equal protection and due process for the trial court to ask the jury voir dire questions regarding their beliefs about capital punishment where the jury does not impose sentence.[1] Petitioner does not claim that jurors were improperly

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1. Petitioner apparently does not argue that there is evidence in the record to show a death-qualified jury is more likely to convict than a jury selected without regard for jurors' scruples against the death penalty, and no record was made in this case to prove the conviction propensities of death-qualified jurors. See Bumper v. North Carolina, 391 U.S. 543, 545 (1968); Witherspoon v. Illinois, 391 U.S. 510, 517-18 n.11 (1968); Spinkellink v. Wainwright, 578 F.2d 582, 593-95 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

excluded from the panel of prospective jurors because of their beliefs, but objects solely to the asking of the voir dire questions. He overlooks the fact that Witherspoon v. Ilinois, 391 U.S. 510 (1968), and the line of cases following it, deal with the unconstitutional exclusion of jurors based on their beliefs about the death penalty. Recently, in Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), this Court summarized the constitutional standard as follows:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

___ U.S. at ___, 100 S.Ct. at ___, 65 L.Ed.2d at 589 (emphasis added).

In this case, the following excerpt is representative of the voir dire conducted with each prospective juror:

> Q. [BY THE COURT:] Now, there is another phase of Arizona Law that I want to discuss with you for a minute. I will explain something to you then I have a question to ask you. Under Arizona Law the Judge has the responsibility of deciding whether the penalty imposed will be life imprisonment or death, and of course, the Judge makes that decision only if the Jurors return a verdict of guilty of murder in the first degree in any one of the verdicts sent to the Jury. Okay, sir?
>
> A. [BY A JUROR:] Yes.
>
> Q. Now, do you have any conscientious objections against the death penalty?
>
> A. No, sir.

Q. What we refer to commonly as Capital punishment, you understand that, don't you, sir?

A. Yes.

Q. Do you have any feelings, on the other hand, that because you have no objections to the death penalty that you are inclined to want to return a verdict of first degree murder in this or any other case simply because you know that that will set the stage whereby the Judge might be in a position to return a penalty of death rather than life imprisonment?

A. No, sir.

Q. Okay, sir. You understand that the Judge makes this decision and the Jury has no responsibility in that matter at all?

A. Yes, sir.

Q. Now, the Judge makes this decision after a hearing at a later date following, during which hearing I should say, the Defendant has an opportunity to present any testimony that he wants of any mitigating nature whatsoever?

A. Yes.

Q. Okay. Does this make any difference to you at all?

A. No, sir.

Q. Do you think you could decide this case based solely on the evidence and the instructions as to the law which the Court will give to you, if you are selected as one of the 12 Jurors, sir?

A. Yes, sir.

(R.T. of June 7, 1978, at 410-11.) Clearly, the questions were designed to determine if the prospective jurors could consider and decide the facts impartially and follow the law as instructed by the court. Not one juror was excluded for cause because of his views on the death penalty. In fact, the jurors who expressed concern or reservations about capital punishment were not challenged for cause.

(R.T. of June 8, 1978, at 546-48; R.T. of June 9, 1978, at 858-66, 869-71, 889-90.)

Because no jurors were excluded from the panel of prospective jurors, there was no violation of the constitutional principles set out in Witherspoon and Adams, and petitioner's contentions are without merit.

ARGUMENT

III

THERE BEING NO TRUE CONFLICT AMONG COURTS, NO EX POST FACTO VIOLATION, AND A VALID SEVERANCE OF THE STATUTE, PETITIONER PRESENTS NO SUBSTANTIAL CHALLENGE TO THE SENTENCING PROCEDURES UTILIZED.

A. The Arizona Court properly severed subsection F of Ariz.Rev.Stat.Ann. § 13-454 (1973).

In Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978), the court held that, because Arizona's death penalty statute was too restrictive in terms of the mitigating circumstances that the trial court could consider, the statute was invalid to that extent. Later that year, the Arizona Supreme Court held that the constitutional and unconstitutional portions of Arizona's death penalty statute were severable, and that the constitutional portion remained in full force and effect. State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), cert. denied, 440 U.S. 924 (1979). The Watson Court then remanded the case for resentencing in order to give Watson the opportunity to present any evidence in mitigation. (Id.)

Petitioner assails the Arizona Supreme Court's action as a judicial "rewriting" of the statute. Petitioner fails to note that, when the Arizona Legislature did amend the statute on May 1, 1979, it amended it in a fashion that was wholly consistent with the Arizona Supreme Court's language and holding in Watson. In any event, the Arizona Supreme

Court correctly held that the statute was severable. In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), this Court held that the Federal Kidnapping Act was not entirely invalid merely because the punishment clause violated the Fifth and Sixth Amendments to the United States Constitution. In so holding, this Court reiterated the following language employed in Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed.2d 1062 (1932):

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

286 U.S. at 234. The Jackson Court went on to note as follows:

> The clause in question is a functionally independent part of the Federal Kidnapping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravating kidnapping cases would have chosen to disgard the entire statute if informed that it could not include the death penalty clause now before us.

390 U.S. at 586. Similarly, there is no reason to believe that the Arizona Legislature would have done away with Arizona's death penalty if it had known that the original penalty provision was invalid. The Arizona Supreme Court properly held that the statute was severable. See also Buckley v. Valeo, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659, 739 (1976); Harrison v. NAACP, 360 U.S. 167, 178, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152, 1159 (1959).

B. Petitioner's constitutional protection against ex post facto laws has not been violated.

Because petitioner was convicted before Watson was decided and sentenced pursuant to Watson, he contends there has been a violation of the guarantee against ex post facto laws. He claims that chapter 138, § 10, Laws 1973, requires that he be given a life sentence. The provision relied on by petitioner states as follows:

> In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of 25 calendar years.

Petitioner's analysis does not take into account the fact that the Arizona Supreme Court did not hold that the death penalty itself was unconstitutional, it held only that the procedure to determine the sentence was unconstitutional. The single flaw discovered in Arizona's death penalty statute was a limitation on the factors which a defendant could introduce in mitigation of the death penalty. Once petitioner's "severability" argument is rejected, as the aforementioned authorities suggest it should be, his ex post facto claim has no merit. Section 10 never came into play, and thus petitioner should not have received a life sentence by operation of law. Petitioner was sentenced to death under a statute that passed constitutional muster except with respect to one aspect of the penalty clause. That clause was severable from the remainder of the statute. Petitioner was then given the opportunity to present any and all circumstances in mitigation of his offenses. He was sentenced to death. Although petitioner's argument might have merit if the entire

statute, or at least a nonseverable portion of the statute, had been declared unconstitutional, the argument has no merit under these circumstances. It is clear that, despite the unconstitutional limitation on mitigation evidence (which was severed), there was a death penalty "in effect" when petitioner committed the crimes, so a hearing in which a death sentence may be imposed envisions no new, different, or harsher penalty than the one petitioner faced from the beginning. Dobbert v. Florida, 432 U.S. 282 (1977); Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). Hence, the prohibition against ex post facto laws does not apply.

In sum, there is no true conflict in decisions between state courts, and no ex post facto violation. There is no substantial reason for granting certiorari on these issues.

C. The question of the constitutionality of State v. Watson has been decided adversely to petitioner by the federal district court, and is presently pending on appeal in the Ninth Circuit.

On April 18, 1980, the federal district court entered its opinion upholding the constitutionality of the decision in Watson. Knapp v. Cardwell, No. CIV. 78-385 PHX. (CAM) (D.Ariz., Apr. 18, 1980). This case is a class action involving petitioner and 29 other inmates presently on death row.[2] The decision by the federal district court has been appealed, and is presently pending before the Ninth Circuit Court of Appeals. Knapp v. Cardwell, No.

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2. Included in this group of 30 inmates are five inmates who have had their petitions for certiorari denied by this Court: Carriger v. Arizona, 444 U.S. 1049 (1980); Evans v. Arizona, No. 79-6752 (U.S., Oct. 6, 1980); Steelman v. Arizona, No. 80-5252 (U.S., Oct. 14, 1980); Mata v. Arizona, No. 80-5228 (U.S., Oct. 20, 1980); Jordan v. Arizona, No. 80-5399 (U.S., Nov. 10, 1980).

80-5419 (9th Cir., filed May 10, 1980). Respondent submits that, if this Court should want to review the Watson decision, it would be more advantageous to do so after the Ninth Circuit issues its opinion.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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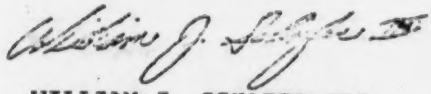

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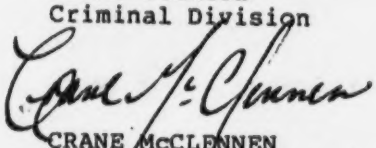

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